IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. [redacted] 34

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation,

Petitioners,

against

THE STATE OF KANSAS, *ex rel.* A. B. MITCHELL (substituted as Attorney General),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND SUPPORTING BRIEF.

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THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation, Petitioners, against THE STATE OF KANSAS, *ex rel.* A. B. MITCHELL (substituted as Attorney General), Respondent.	No. 745

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND SUPPORTING BRIEF.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, The Sage Stores Company, a corporation, and Carolene Products Company, a corporation, by SAMUEL H. KAUFMAN, of New York, N. Y., and THOMAS M. LILLARD, of Topeka, Kansas, their attorneys, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, which granted judgment in an original action in *Quo Warranto* enjoining petitioners from selling or keeping for sale the food product of petitioner Carolene Products Company, upon the ground that the sale of such product violated Section 65-707 (F) (2) General Statutes Kansas 1935.

Jurisdiction.

This Court has jurisdiction to review the judgment of the Supreme Court of Kansas under Section 237B of the Judicial Code as amended by the Act of February 13, 1925. The date of the judgment sought to be reviewed is October 2, 1943. A motion for rehearing was denied December 11, 1943 (157 Kansas 622). (R 821)

Statutes Involved.

The statute involved is Section 65-707 (F) (2) General Statutes Kansas 1935 (printed in the appendix hereto).

Manner in Which Federal Questions are Raised.

Section 65-707 (F) (2) G. S. Kan. 1935 is unconstitutional and void in that, in violation of the Fourteenth Amendment to the Constitution of the United States

(a) *it deprives petitioners of their liberty and property without due process of law,* and

(b) *deprives petitioners of the equal protection of the laws.*

Said constitutional questions were raised in the answer interposed by each of the petitioners to the amended petition. (A. 9, 10, 27, 28, 29, 30, 45 and 46.) An exception was taken to the Commissioner's conclusion of law number 12 (adopted by the Court—157 Kansas 412) that the statute is constitutional (exception 12 A. 539).

The Opinion Below.

The Supreme Court of Kansas was divided by a vote of four to three (157 Kans. 404, 141 Pac. (2d) 655). Under the practice of the Kansas Supreme Court, the majority (R 65

opinion is written by the justice to whom the case is assigned, even though he dissents from the majority. Hence, in this case, both the majority and dissenting opinions are written by Justice Wedell.

The justice who cast the deciding vote sustaining the constitutionality of the statute was the former State Attorney General, who instituted the action as relator and was in charge of the prosecution until after the report of the Commissioner.

A motion for a rehearing was denied with opinion (157 Kansas 622). (R 8 21)

Summary Statement of Matters Involved.

The State of Kansas, by Jay S. Parker, Attorney General, as relator, instituted an original action in *Quo Warranto* in the Supreme Court of Kansas, charging petitioners with violating Section 65-707 (F) (2) G. S. Kan. 1935, which prohibits the sale, or possession with intent to sell, of skim milk or any other milk, to which has been added any fat or oil other than milk fat. The State sought to oust petitioner Sage Stores Company from doing business as a corporation, and to enjoin the petitioner Carolene Products Company from selling its products.

Petitioner, The Sage Stores Company, is a Kansas corporation engaged in the retail sale of food products, including the product in question (A. 72, 73). Petitioner, Carolene Products Company, is a Michigan corporation not licensed to do, or doing, business in the State of Kansas, and engaged, among other things, in the shipment of Milnot and Carolene, the food compound in question, to jobbers and wholesalers in the State of Kansas in the original package (A. 73). Milnot and Carolene are identical, except as to trade name, and will hereinafter be referred to as "Carolene". (Finding of Fact 4, A. 494.)

Petitioners interposed identical answers to the amended petition (A. 9-46). In each answer it was set forth that the amended petition was insufficient as a matter of law. Each answer also set up as a defense that Carolene was a wholesome, nutritious, beneficial and unadulterated food product (A. 11); that the Kansas statute was aimed at milk products deficient in vitamins; that at the time of the enactment of the Statute, there was undiscovered and unknown any method of fortifying food products with vitamins, as Carolene is fortified (A. 19); that the prohibition of the sale of Carolene deprived petitioners of their liberty and property in violation of the due process and the equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States (A. 28).

The issues raised were (1) is Carolene a wholesome, nutritious and properly labelled food product, and (2) does Section 65-707 (F) (2) G. S. Kan. 1935 deprive petitioners of their liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Kasas appointed a Commissioner to take testimony and report. Certain facts were agreed on, among them the nature and method of manufacture of the food product in question. In addition, extensive hearings were held. The Commissioner filed his Report consisting of Findings of Fact and Conclusions of Law. The relevant Findings of Fact made by the Commissioner may be summarized as follows:

(a) Carolene is a wholesome, nutritious and harmless food product (Finding of Fact 53, A. 519). Its sole ingredients are pure skim milk, pure refined cottonseed oil and vitamins A and D (Finding of Fact 6, A. 495). Each of the ingredients is uniformly

recognized as a pure, wholesome and nutritious food product (Findings of Fact 12, 13 and 16, A. 496-499). Skim milk is a wholesome nutritious food, valuable for its content of protein, carbohydrates (milk sugars), minerals and water soluble vitamins (Finding of Fact 13, A. 497). Refined cottonseed oil is a pure, wholesome, nutritious and beneficial food suitable for human consumption, which is in general use throughout the United States as a food and food shortening and as a cooking oil and in salad dressings, oleomargarine and in the compounding of many lards (Finding of Fact 12, A. 496).

(b) The fat soluble vitamins A and D with which Carolene is fortified are obtained from prime natural sources; they are called "natural vitamins" and are equal in nutrition to vitamins supplied through butter fat or other sources; and the fortification of foods with these vitamins is recognized by nutritionists as proper practice (Findings 8, 16, A. 496, 499). It was not believed commercially possible to fortify foods with vitamins A and D until after 1930 (Finding 15, A. 499).

(c) "*There is no history of injury resulting from the fortification of foods with natural vitamins*" (Finding 16, A. 500).

(d) Carolene has a greater constant supply of vitamins A and D than evaporated whole milk (Findings 7 and 19, A. 496, 502).

(e) Nothing is added to Carolene to give it an artificial flavor or color or to give it a resemblance to any other food or food products (Finding 33, A. 509).

(f) Carolene is manufactured in modern sanitary creameries. It is evaporated in the same manner as whole milk is evaporated in the manufacture of evaporated milk. It is placed in hermetically sealed cans, and thoroughly sterilized in the same manner as canned evaporated milk. It is rendered thereby absolutely free of all bacteria and so remains thereafter. (Finding 6, A. 495).

(g) The label clearly discloses the ingredients of the product (A. 17); it states in bold type that the product is "not evaporated milk or cream", but is "a compound of evaporated skimmed milk, cottonseed oil, Vitamins A and D in fish liver oil".

(h) Carolene sells at about fifteen per cent less than evaporated whole milk (Finding 35, A. 510-511), and "is used principally by families in the low income group * * *. It has had good customer acceptance * * * housewives who have used it prefer it to evaporated milk * * * it will whip * * * it is cheaper * * * it will keep longer * * * than evaporated whole milk." (Finding 38, A. 511-512).

(i) One third of the people do not have enough money to buy the right kind of food. There is a shortage in this country of the food factors of skim milk. Each year almost fifty billion pounds of skim milk, concededly an excellent food, are fed to animals or destroyed,—absolutely wasted as far as human consumption is concerned (Finding 13, A. 497).

(j) The deficiencies of the defendant's product as compared to evaporated milk are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in

the diet of adults who consume a varied diet; in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and their diet is partially inadequate (Finding 53, A. 519). However, neither milk itself nor any other single food contains all the elements necessary for an adequate diet; it is deficient in iron, copper, manganese and Vitamin D (Findings 19, 20, A. 502-3), and in the case of infants, pediatrists do not advise the use of even whole milk as a sole diet without modification or addition of other substances (Finding 20, A. 502-3; see also Finding 16, A. 500, and Finding 48, A. 515).

(k) In 1940, Litchfield Creamery Company, which manufactures the product, purchased more than two million dollars worth of whole milk from approximately 4800 dairy farmers. After making butter from the cream in the whole milk so purchased, the skim milk was used to make 1,100,000 cases of Carolene in the year 1940 (Finding 23, A. 504).

At the hearings before the Commissioner, the State proposed to prove that Carolene is not wholesome and nutritious (A. 60). The State failed in this and, on the contrary, the Commissioner found that Carolene *is* wholesome and nutritious (Finding of Fact 53, A. 519).

The Kansas Supreme Court held that the statute was constitutional upon the ground that since there is a "substantial disagreement" as to whether Carolene, although a wholesome and nutritious food product, *is inferior, equal or superior to evaporated whole milk*—as to which the Court ventured no opinion—the Legislature had the power to ban it absolutely, if the Legislature believed that dealers might sell the product as milk.

A dissenting opinion was written by Justice Wedell, concurred in by Justices Hoch and Smith, in which it is shown that the statute is unreasonable, arbitrary and discriminatory, and cannot be justified as a health measure.

The decision in this case was by a four to three vote. Justice Parker, who cast the deciding vote, was the Attorney General who instituted the action as relator, and who remained in charge of the case until after the report of the Commissioner appointed by the Court. After the report of the Commissioner had been filed, Mr. Parker became a Justice of the Supreme Court of Kansas. The manner of his participation in the decision is disclosed by the following excerpt from the Opinion of the Court on the denial of the motion for rehearing:

> "When the case was reached for conference Mr. Justice Parker voluntarily expressed a preference not to participate in the conference or decision unless his official duties as a member of this court required him to do so. This request was freely granted. *He remained in the conference but took no part therein until after it developed his vote was necessary for a decision.* The court was of the opinion he was not disqualified to participate and that under the circumstances it was his duty to do so." (Italics ours) (157 Kan. p. 629). (R 829)

We thus have the remarkable situation of the deciding vote being cast by a justice who, as Attorney General of the State, was the original relator in the suit, and who remained in charge of it for upwards of a year thereafter. It is submitted that Justice Parker was disqualified from acting in this case. There being an equal division of the remaining justices of the Court, and the case being an original action, no decision was reached and no judgment should have been rendered.

Questions Presented.

1. Is Section 65-707 (F) (2) G. S. Kan. 1935, which prohibits the product in question, an arbitrary, unreasonable and discriminatory interference with petitioners' rights of liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States?

2. Justice Parker having been the Attorney General who instituted this case and who remained in control of it until after the Commissioner filed his Report, did Justice Parker's participation in the decision of the Court, which granted judgment against petitioners by a four to three vote, render the judgment invalid as in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

The Reasons Relied on for the Allowance of the Writ.

I. Since Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits, without fraud on the public, Sec. 65-707 (F) (2) General Statutes of Kansas 1935, which bars the sale of such product, is unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United States.

II. The Kansas Supreme Court erred in holding that Sec. 65-707 (F) (2) G. S. Kan. 1935 is a reasonable exercise of the police power and does not deprive petitioners of their liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States. This Federal question is one of substance, not heretofore determined by this Court.

III. The statute is arbitrary, unreasonable and discriminatory. It does not purport to state any standard of minimum nutrition. Skim milk, which is deficient in fat soluble vitamins A and D may be sold, yet skim milk which is fortified with Vitamins A and D is barred, if any fat or oil other than milk fat is added, and this, even though the compound is not only more nutritive than skim milk, but than whole milk itself.

IV. The statute cannot be justified as one designed to prevent possible deception of the public. A state statute which absolutely prohibits a wholesome article is violative of the due process clause of the Fourteenth Amendment, since protection against possible deception may be accomplished by regulation.

V. When, as now, the food supply is insufficient to meet not only the desires, but the actual needs, of the public, the rule which makes it "a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden" takes on such added force that it becomes a rule of necessity, for this Court has repeatedly held that the circumstances and conditions existing at the time a legislative enactment comes before the Court should be given weight in determining the constitutionality of the statute.

VI. The judgment of the Kansas Supreme Court on the foregoing substantial Federal questions is in conflict with applicable decisions of this Court.

VII. The conflicting decisions of the highest courts of various states on the foregoing important Federal questions call for a decision by this Court, authoritatively settling the questions.

VIII. Justice Parker was disqualified in view of the fact that he had instituted the litigation as Attorney General, and continued to act as such for more than a year. The other members of the Court being equally divided, the judgment violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Kansas, commanding that Court to certify and to send to this Court, for its review and determination, the full and complete transcript of the record and all proceedings in the case entitled on its docket "The State of Kansas, *Ex Rel.* A. B. Mitchell (Substituted), as Attorney General, Plaintiff, against The Sage Stores Company, a corporation, and Carolene Products Company, a corporation, defendants" and that said judgment of the Supreme Court of Kansas may be reversed by this Honorable Court and your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: February 15th, 1944.

THE SAGE STORES COMPANY,
CAROLENE PRODUCTS COMPANY,

By SAMUEL H. KAUFMAN,
THOMAS M. LILLARD,
Attorneys for Petitioners.

IN THE

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OCTOBER TERM, 1943

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation,

Petitioners,

against

THE STATE OF KANSAS, *ex rel.* A. B. MITCHELL (substituted as Attorney General),

Respondent.

No. 745

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Italics ours)

Statement.

Reference is respectfully made to the foregoing petition for a statement of jurisdiction, questions presented, a summary statement of the case, and the opinions of the Kansas Supreme Court.

Specification of Errors.

1) The Kansas Supreme Court erred in holding constitutional §65-707 (F) (2) General Statutes Kansas 1935, which absolutely prohibits the sale of Carolene, a whole-

some and nutritious food product. Said section deprives the petitioners of their liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States.

2) Justice Parker's participation in the decision of the court, which decided this action by a four to three vote, was a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

POINT I.

Since Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits without fraud on the public, Section 65-707 (F) (2) General Statutes of Kansas 1935, which bars the sale of such product, violates the Fourteenth Amendment to the Constitution of the United States.

The basis of the court's decision below is found in the following quotation from the majority opinion:

> "For the purpose of determining the constitutionality of the law in question it is immaterial whether we believe defendant's product, when considered as a whole is inferior, equal or superior to whole milk or evaporated whole milk if substantial disagreement in fact exists with respect to the inferiority of the product as compared with whole milk or evaporated whole milk, and the legislature has some basis for believing a filled-milk product is likely to be sold or is susceptible of being sold as and for whole milk or evaporated whole milk with the result that the public may be deceived thereby." (157 Kan. 404, 412.) (R 660)

A.

A wholesome and nutritious product, as Carolene is admitted to be, may not be proscribed merely because there is a substantial disagreement as to whether or not it is inferior to whole milk or evaporated milk.

It is appropriate to note at the outset that there was no finding by the Commissioner, and there is no finding by the Court, that milk is good and Carolene is bad. The findings are that both are wholesome and nutritious, but that neither of them alone contains all the nutritional elements required for a balanced diet: both must be supplemented by other foods. (Findings of Fact 19, 20, 53 A. 502, 519.) The statute does not purport to fix a nutritional standard: it bans any milk compound if it contains any fat or oil other than milk fat, and this, even though the product be more nutrititous than milk itself. If whole milk were taken, and to it were added any non-milk fat, no matter how nutritious the fat, and even though the resultant compound were more nutritious than whole milk, the product would still be banned. In short, milk to which a non-milk fat has been added may not be sold, even though it be superior to milk itself.

Conversely, this statute permits the sale of milk from which vital constituents have been abstracted, as, for example, skimmed milk, which is devoid of vitamins A and D; yet it prohibits the sale of that same skimmed milk if the vitamins A and D are restored to it through the medium of a fat or oil other than milk fat, and this, despite the fact that the non-milk fat so added contains no injurious or deleterious substance and creates a resultant product more nutritious than whole milk itself.

The effect of this statute is to close the door to progress in the improvement of milk products by arbitrarily banning any milk product, no matter how nutritious it may be, if there be in it any fat or oil other than milk fat.

Such a discrimination is arbitrary and unreasonable; it is based neither on logic nor on reason.

There is a manifest fallacy in the opinion of the learned court below in making the test of the legislative power to ban Carolene the existence of a "substantial disagreement" as to whether or not that product is inferior, equal or superior to whole milk or evaporated milk.

To say that there is a substantial disagreement as to whether or not Carolene is inferior to whole milk is but another way of saying that there is a substantial disagreement as to whether or not whole milk is inferior to Carolene. Consequently, the existence of such a disagreement would be as much justification for banning milk as it would be for banning Carolene. Yet no one would argue that the Legislature could ban the sale of whole milk because there was a "substantial disagreement" as to whether or not Carolene is superior to it.

As Justice Wedell said in his dissenting opinion below:

> "Shall this law be upheld upon the principle that the legislature has the power and authority to select for the individual citizen what food he shall eat and drink because in the judgment of that body, supported by some creditable testimony, one kind or brand of food or drink is slightly superior in some respects to another food or drink although the latter is admittedly superior in other respects? *If the legislature possesses the power to determine that fact as to one food, it manifestly has the same power with respect to every food. Such power would enable the legislature to ban many common articles of commerce as, for example, syrup not all maple, shoes not all leather, (Carolene Products Co.* v. *Thomson, supra) clothes or comfortables with shoddy in them (Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654) *and the like*" (157 Kan. 425). (R. 674)

The fallacy in the argument of the learned Court below was recognized by the state, as appears from its efforts to base its case, not on the contention that Carolene is inferior to whole or evaporated milk, but on the contention that Carolene is "not wholesome and nutritious" (A. 60). In this the state failed: the Commissioner found (Finding of Fact 53, A. 519) that Carolene is "wholesome, nutritious and harmless".

From the standpoint of a health measure, there is no more justification for banning the sale of Carolene because there is disagreement as to whether or not it is more nutritious than milk, than there would be for banning milk because it is less nutritious than cream. The true rule to be applied is not the comparative nutritive quality of the two products, but whether or not the product in question is a nutritious one. Since Carolene is wholesome and nutritious (Finding of Fact 53, A. 519) its sale may not be prohibited, irrespective of whether milk is more or less so; all that could be required is regulation to ensure that those who want milk will get milk and not Carolene, and that those who want Carolene will get Carolene and not milk.

Schollenberger v. *Penn.*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, was a criminal prosecution for violation of a statute banning the sale of oleomargarine. In reversing the conviction, this Court said, by Peckham, J. (p. 12):

> "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food."

And at page 14:

> "We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated article into the state.
>
> * * * * *
>
> "Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one."

Further at page 25:

> "It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome."

Weaver v. *Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. 320, 70 L. Ed., 654, involved the constitutionality of a Statute of Pennsylvania prohibiting the use of shoddy in comfortables and mattresses. In affirming a decree against the official charged with enforcing the law, Mr. Justice Butler said (pp. 412-3):

> "Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. *And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden.*"

Further (p. 415):

> "The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin, ante*, p. 230. *The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment.* *Adams* v. *Tanner*, 244 U. S. 590, 596; *Meyer* v. *Nebraska*, 262 U. S. 390; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504."

In *People* v. *Biesecker*, 169 N. Y. 53, Cullen, J., said at page 57:

> "The legislature cannot forbid or wholly prevent the sale of a wholesome article of food."

Statutes identical, or substantially identical, with the one here involved, have been declared unconstitutional by the Supreme Courts of Nebraska, Michigan and Illinois as constituting unreasonable health measures.

Carolene Products Company v. *Thomson*, 276 Mich. 172;
Carolene Products Company v. *Banning*, 131 Neb. 429;
Carolene Products Company v. *McLaughlin*, 365 Ill. 62.

The words of Justice Wedell, in his dissenting opinion below, may appropriately be repeated here:

> "I am, however, unwilling to see constitutional guaranties of the citizen's right to engage in a legitimate business whittled away when there is no reason-

able basis for believing that the public welfare probably could not be protected adequately by regulation of the business. *It is not only important that the constitutional guaranty to the citizen to transact a legitimate business should be zealously protected by the courts. It is also most vital that the public should not be deprived of its right to purchase a desirable and healthful article of food which scientific research and discovery have made available to the public at a low cost and in a form easily preserved by the citizen in the lower income groups who is not blessed with refrigeration facilities*" (157 Kan. 430). (R 680)

B.

There is no claim of fraud by petitioners in the sale of Carolene, nor is there any evidence or finding which would even suggest that regulation, as distinguished from prohibition, would not adequately protect the public from any possible attempt at deception by retailers.

There is no claim that either of the petitioners was guilty of fraud or deception in the sale of Carolene. The product is labeled in such a manner as to clearly show its contents (A. 17). The label plainly states that the product is "not evaporated milk or cream," but that it is "a compound of evaporated skimmed milk, cottonseed oil, vitamins A and D in fish liver oil". The label also clearly states that Carolene is "especially prepared for use in coffee, baking and for other culinary purposes". The label meets all questions raised, and suggestions made, by the Administrator of the Federal Food and Drug Administration (A. 440-441). Nothing is added to the product to give it artificial taste or color, or to give it a resemblance to any other food product. (Finding of Fact 33, A. 509.)

Insofar as deception by others than petitioner is concerned, the findings show that there has been very little, if any, attempt by retailers to sell Carolene as milk. The evidence is merely that *in the course of two years*—1940 and 1941—a deputy dairy commissioner called at *28 stores in the whole of the State of Kansas* and would ask for "cheap canned milk"; that in "many" of these 28 stores, defendant's product was displayed "with or near evaporated milk"; in "some" of these 28 stores, the clerk first recommended defendant's product; in "several" instances, the clerk either first recommended some brand of evaporated milk, or some brand of evaporated milk and defendant's product, and that in "many" of these 28 stores, the clerk either informed the deputy of the nature of the product or read to him from the label, but a "majority" did not disclose the "nature" of the product. (Finding 31, A. 508-9.)

Another finding (Finding 32, A. 509) is that "most" housewives know what Carolene is, although "some" do not, and that the "majority" of them call for the product under its trade name. "Some" call for it as "Milnot milk" and "some" of the retail grocers testified that they so referred to it.

The only other finding on this subject (Finding 34, A. 509-10) is that "various" retail grocers—the number and the period of time not being given—have advertised Carolene in their local newspapers on their own initiative and at their own expense, and that in such advertisements there have appeared *six or seven* references to petitioner's product in which the name was linked with the word "milk".

This, it is submitted, is clearly insufficient to show that there is any appreciable misunderstanding on the part of the purchaser, or deception on the part of dealers, *and it is highly significant that neither the Commissioner nor the learned Court below found that fraud or deception had been practiced.*

Assuming, *arguendo*, that an unscrupulous dealer here or there might attempt to deceive a customer by giving him Carolene when he wanted milk, the remedy lies, not in proscribing a highly nutritious and honestly labeled food product, but in the promulgation of regulations to prevent deception. Indeed, such regulations exist in Kansas. The Kansas law provides regulations to prevent deception in the sale of foods and penalties for false label or misbranding (Sec. 65-602, G. S. 1935); it empowers the state board of health to promulgate appropriate rules and regulations (Sec. 65-603, G. S. 1935); it prohibits imitation of, or offering any product for sale under the name of, any other food (Sec. 65-608, G. S. 1935), and "false, misleading or fraudulent advertising" (Sec. 21-1112, G. S. 1935). With all of these the petitioners have scrupulously complied.

In *Carolene Products Company* v. *Banning*, 131 Neb. 429 (1936), Carter, J. said at pages 437, 438:

> "The contention is made that the prohibition of the sale of Carolene and like products should be upheld under the police power because it would prevent the perpetration of fraud on the public. The evidence shows that in a few cases retail grocers kept Carolene on the same shelf with condensed milk, that a few exhibited Carolene to customers who asked for milk or evaporated milk, and some retailers advertised Carolene as milk. *We cannot say that a few instances of deception on the part of retailers are sufficient to give authority to the legislature under the police power to prohibit the sale of a product. To so hold would give the legislature power to prohibit the sale of any article on the market, as all are subject to the possibility of being misrepresented.* If retailers of a wholesome and nutritious food product practice deception in its sale, *the remedy is by regu-*

lation, and not by a destruction of the business. After a consideration of all the evidence, we fail to find that the possibilities of fraud are such as would sustain the exercise of the police power of the state in prohibiting the sale of Carolene. *The evils of which the state complains can undoubtedly be avoided by reasonable legislative regulations.*" (Italics ours.)

And in *Carolene Products Company* v. *Thomson*, 276 Mich. 172, *supra*, Fead, J. said at pages 180, 181 and 182:

"The State also contends that the act may be sustained under the police power to prevent fraud, but it fails to suggest the specific fraud to prevention of which the prohibition of the statute is reasonably related. Defendants made no showing of possibility of fraud in the sale of Carolene except that three grocers in Lansing kept the product on shelves with evaporated milk; * * * and a retailer in Grand Rapids advertised Milnut as giving 'better results than ordinary evaporated milk. A blend-evaporated.'"

* * * * * *

"*It seems incontrovertible that any possibility of fraud, sufficient in extent to be called public, in the sale of a harmless and nutritive food product may be avoided by regulations* as to branding, disclosure of ingredients, kinds and marking of containers, requirement that eating places give notice to customers of its use as is already provided for oleomargarine, 1 Comp. Laws 1929, Sec. 5374, and otherwise. Stringent, even onerous, regulations to protect milk are valid.

"Regulations of various sorts have been found adequate for the protection of the public in the sale of other milk products. There has been no attempt, by testimony or argument, to indicate that they would

not be effective in the vending of Carolene, and, in view of the fact that both elements of the product are lawful objects of sale in the State, only their union is prohibited and the completed product is harmless; the remedy necessary to avoid infringement upon constitutional rights is by way of regulation, not prohibition. *Weaver* v. *Palmer*, 270 U. S. 415."

In *People* v. *Marx*, 99 N. Y. 377 (1885), the Court of Appeals held unconstitutional a statute which absolutely prohibited the sale of oleomargarine. The Court held that the object of the statute was not to protect against fraud and deception by means of imitation of butter, but to prevent the sale of any article which could be used as a substitute for it. The Court held that such a statute was violative of the due process of law clause.

In the *Weaver* case, 270 U. S. 402, 46 Sup Ct., 320, 70 L. Ed. 654, a statute prohibiting the use of shoddy in comfortables and mattresses was held unconstitutional. The Court declared that inasmuch as the product was a useful one, its use should not be forbidden, and that any danger incident to its use should be guarded against by regulation. Mr. Justice Butler said (pp. 414-415):

"Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. *As against that fact, the provision in question cannot be sustained as a measure to protect health.* And the fact that the Act permits the use of numerous materials, prescribing sterilization if they are second-hand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

"*Nor can such prohibition be sustained as a measure to prevent deception.* In order to ascertain

whether the materials used and the finished articles conform to its requirements, the Act expressly provides for inspection of the places where such articles are made, sold or kept for sale."

* * * * *

"Obviously, these regulations or others that are adequate may be effectively applied to shoddy-filled articles."

It is clear from the foregoing authorities that a wholesome and nutritious product may not be barred by legislation upon the ground that prohibition is necessary to protect the public from deception. Full protection can be given by regulation.

The majority opinion below places reliance upon the earliest of the oleomargarine cases, *Powell* v. *Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 1257, 32 L. Ed. 253 (1888). The doctrine announced in that case was completely rejected by this Court in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; 18 Sup. Ct. 757, 43 L. Ed. 49. Every argument advanced by the State in the instant case was advanced there, and rejected. After pointing out that a wholesome and useful article of commerce may not be wholly excluded from importation into a state, Peckham, J., said (p. 12):

"A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food * * *. Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult or burdensome? Can the pure and healthy food product be totally excluded on that account? *No case has gone to that extent in this court.*"

The majority below also relied on *Hebe* v. *Shaw*, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255. The *Hebe* case was decided by a divided court, three justices dissenting, and is clearly distinguishable from the case at bar. There was no arbitrary discrimination in the Ohio statute there involved; it prohibited the sale of condensed, skimmed milk in any form; it did not, as does the statute here involved, permit the sale of skimmed milk alone, while prohibiting its sale if compounded with another substance which concededly increases its nutritional value. Furthermore, the decision in the *Hebe* case was modified and limited by the later decision of this court in *Weaver* v. *Palmer, supra.* (See: *Carolene Products Co.* v. *Thomson*, 276 Mich. 172.)

The State also relied on *State, ex rel Carnation M. P. Company* v. *Emery*, 178 Wisc. 147, in which the Wisconsin Supreme Court held the Filled Milk Act of that State constitutional. That case, however, as the learned Court below stated in its opinion, was later overruled by *John F. Jelke Co.* v. *Emery*, 193 Wis. 311, in which a statute prohibiting the manufacture of oleomargine was held unconstitutional upon the ground that the Legislature did not have the power to outlaw a wholesome and nutritious article of food. Before quoting from the *Jelke* case, it should be noted that the state, in this case, gave much evidence on the magnitude of the dairy industry and the economic effect upon it of the sale of Carolene; and the Commissioner evidently regarded that evidence as sufficiently material upon the question here involved to make a lengthy finding on that subject. (Finding 24, A. 504-5.) To return to the *Jelke* case, the Court there said of the Wisconsin Act at pp. 318, 323:

> "It prohibits the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food. * * *the legislature has no more power to prohibit the manufacture and sale of oleomargarine in*

aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry."

United States v. *Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, cited below, is not in conflict with the foregoing authorities.

Although the Federal Act was held constitutional in that case, the result followed only because the defendant there, *by its demurrer, admitted for the purpose of that case that the product there involved—a skim milk compound not fortified by vitamins A and D; as Carolene now is—was injurious to public health and a fraud upon the public. This, as the Court pointed out, left for decision only the question whether or not Congress had power to prohibit the shipment of such an article of food in interstate commerce. The question now presented is an entirely different one, affected in no way by the earlier decision.*

As said by this Court in *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 32 S. Ct. 193, 56 L. Ed. 350, at p. 64:

> "Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way."

The validity of the statute is here attacked in an entirely "different way" from that in *U. S.* v. *Carolene*, 304 U. S. 144. There is here no admission by demurrer that the petitioner is selling "an adulterated article of food injurious to the public health," but, on the contrary, a record which shows that the product is wholesome and nutritious, and that any contention that its sale is a fraud upon the public is without substantial foundation. If, in *United States* v. *Carolene Products Co.*, *supra*, the defendants had gone to trial on the facts, instead of demurring to the indictment and thus admitting all its allegations, the situation would have been similar to that in the pres-

ent case, and the rule applied in the *Weaver-Palmer* case, *supra,* would have applied. Thus in the main opinion in *United States* v. *Carolene Products Co.*, Mr. Justice Stone said (p. 153):

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, *and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.*"

To the same effect is the following quotation from Mr. Justice Butler's concurring opinion in the same case:

> "*Prima facie* the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation."

The cases to which we have referred, in which the appropriate safeguard was held to be regulation, and not prohibition, were decided at times when there was no such shortage in the commodity in question as there is now in food. The Findings here show that "almost 50 billion pounds of skim milk are fed to animals or destroyed each year" (Finding 13, A. 497), although (1) there is an acute food shortage, (2) there is no prohibition against the sale of skim milk, and (3) it is "in the interests of the public health that more skimmed milk be used in the human dietary as an addition to our national milk supply" (Finding 13, A. 498).

These circumstances should be given weight in determining the constitutionality of a statute, keeping in mind that constitutionality must be determined in the light of conditions as they exist at the time the question arises. For example, in *Abie State Bank* v. *Bryan*, 282 U. S. 765, 51 Sup. Ct. 252, 75 L. Ed. 690, a Nebraska bank guaranty statute, which had been held valid in 1910 (*Shallenberger v. First State Bank*, 219 U. S. 114), was held invalid under conditions existing in 1931; in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. Ed. 841, a rent control act that had been held valid in 1919 (*Block* v. *Hirsh*, 256 U. S. 135) was held invalid in 1924; in *Newton* v. *Consol. Gas Co.*, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. Ed. 538, a statutory rate which had been sustained for earlier years (*Willcox* v. *Consol. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192), was held confiscatory for 1918 and 1919; in *Nashville, C. & St. L. Ry. Co.* v. *Walters*, 294 U. S. 405, 55 Sup. Ct. 486, 79 L. Ed. 949, this Court, speaking through Mr. Justice Brandeis, held that a changed condition in traffic, due to the development of the automobile, was a matter to be taken into consideration by the Court in determining the validity of a statute imposing a part of the cost of grade separation crossings upon a railroad company.

The millions of dollars being spent by our government to find substitutes for pure rubber are being wisely spent, though synthetic rubber may lack some of the good qualities of natural rubber. If a statute had been enacted in 1923, forbidding the production and sale of synthetic rubber, the courts would today without hesitation strike down such an enactment in the light of present-day scientific progress and also in the light of present economic conditions.

The record in this case brings out the serious shortage that confronts the nation in both butter and milk. With the nation facing such conditions in its food supply, the

necessity for rescuing, for consumption as human food, the billions of pounds of skimmed milk now wasted is a matter of vital public concern.

Needless to say, we are not contending that in times of food shortages the public health should be endangered by the marketing of articles of food that are detrimental to public health. Our contention is that, even under normal economic conditions, when food as well as other articles of convenience are plentiful, the right of the mass of the public to purchase and enjoy articles for which there is a popular demand, and which are useful and nutritious, outweighs any supposed right to absolutely prohibit their sale because of the possibility that occasionally a member of the public may be deceived or misled into buying such an article when he believed he was buying a similar article.

Petitioner's product contributes to that desirable result, with no hazard to the public health.

The sale of plain skim milk being entirely legal, there is no reasonable basis for prohibiting the sale of skim milk whose nutritional value has been increased, merely because the increase has been accomplished by the addition of a wholesome non-milk fat, rather than a milk fat.

POINT II.

The participation of Justice Parker in the decision of this case renders the judgment void in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Fundamental in our political concept is the proposition that the powers essential to government should be distributed among three separate and independent bodies—the legislative, the executive, and the judicial.

The reason for adherence to this principle is stated by Montesquieu as follows:

> "There can be no liberty, * * * if the power of judging be not separated from the legislative, and executive powers. * * * Were the powers of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

No one would suggest that while he held office in one of the executive departments of his State (Kansas Const. Art. 1, Sec. 1), the Attorney General might serve also as a member of the judicial department, and particularly in a case which he had instituted and prosecuted as a member of the executive department. This would clearly be the very evil which Montesquieu had in mind when he wrote: "There can be no liberty * * * if the power of judging be not separated from * * * the executive power."

Nor can it fairly be contended that the principle involved is in any respect altered because shortly before the case to be judged came before the Court for determination, the individual laid aside the garments of the executive and donned the robe of the judiciary.

In Volume 2 of *Cooley's Constitutional Limitations* (Eighth Edition) that distinguished author says, on page 870, *et seq.*:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Par-

liament made against natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturae sunt immutabilia,* and they are *leges legum.'*

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause."

In 30 *American Jurisprudence* 767, the rule is stated as follows:

"Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. It has been pointed out elsewhere that due process of law requires a hearing before an impartial and disinterested tribunal. Every litigant, including the state, in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge, and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent."

The constitutional right of a litigant to have his case determined by a tribunal that is so constituted that it shall be free from any suspicion of interest or prejudice has been applied by this Court in many cases.

In the recent case of *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 209, Frankfurter, J. said, at page 275:

"Certain safeguards are essential to criminal justice. The court must be uncoerced, *Moore* v. *Dempsey*, 261 U. S. 86, *and it must have no interest other than the pursuit of justice, Tumey* v. *Ohio*, 273 U. S. 510."

See also:

Norris v. *State of Alabama*, 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074;
Smith v. *Texas*, 311 U. S. 128, 61 Sup. Ct. 164, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559.

Justice Parker instituted this action as Attorney General. He was the relator in the action. His name was signed to the petition, and on the requests for findings of fact and conclusions of law. He remained in charge of the case, as Attorney General, until after the Report of the Commissioner had been filed. In these circumstances, he was disqualified from acting as a judge in this cause: *by participating in the decision, he cast the deciding vote to sustain the propriety of his own act in instituting the action and in prosecuting it until he was elevated to the Bench.*

That Justice Parker should not have acted herein is best illustrated by what occurred in this court in *U. S.* v. *Aluminum Company of America* and *North American Company* v. *Securities and Exchange Commission*. In each of the foregoing cases, four justices disqualified themselves, and the Court stated that the cases could not be heard until a quorum of six qualified justices is obtained.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

Section 65-707 (F) (2) General Statutes Kansas 1935.

"It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivatives thereof, or under any fictitious or trade name whatsoever."